YONG GYE THIAM

v.

BONG PIN NYEN

HIGH COURT SABAH & SARAWAK, MIRI
DAVID WONG DAK WAH J
[CIVIL APPEAL NO: 12-17-2001(MR)]
19 DECEMBER 2007

TORT: *Negligence - Liability - Appeal against - Whether Sessions Court Judge correct in holding appellant liable for negligence in fire that burnt respondent's house - Shimuzu Corporation v. Ling Tiang Chuan & Anor - Leong Bee & Co v. Ling Nam Rubber Works - Reliance of - Whether could exist side by side - Whether Sessions Court Judge applied correct burden of proof - Whether s. 3(b) of Miri District Council (Prevention of Fire) By-Laws complied with - Whether there were adequate factors for SCJ to make inferences on who caused fire - Whether SCJ correct in applying principles of law - Whether sum awarded for loss of house remained - Whether there were variations of other costs*

This was an appeal against the decision of the Sessions Court Judge (SCJ) in holding that the appellant was liable for negligence. The respondent was the registered owner of a two storey wooden house known as Lot 317 ('respondent's house') while the appellant was the registered owner of the house Lot 364 ('appellant's house') adjoining to Lot 317. A fire broke out on 8 November 1997 at the appellant's house and it had spread over to Lot 317 and burned down the respondent's house.The respondent's claim against the appellant was for the losses and damages suffered as a result of the said outbreak of fire. At the conclusion of the trial, the SCJ held that the fire could not have started without negligence on the part of the appellant, his servants or agents in the appellant's house thus the appellant was found to be liable. The respondent was awarded damages amounting to RM74,050. The appellant's appeal herein attacked the SCJ's reliance of the Singapore case of *Shimuzu Corporation v. Ling Tiang Chuan & Anor* and ignoring the principle set out in the case of *Leong Bee & Co v. Ling Nam Rubber Works*.

A **Held (dismissing the appeal):**

(1) The two cases of *Shimuzu* and *Leong Bee & Co* could exist side by side as they do not contradict each other. In the latter case, the Privy Council was actually stating a principle
B of evidential law and that is the common law presumption that a man answerable for the damage that results from a fire which began on his property has no application in Malaysia and the burden of proof lies on the person who alleged negligence, while the case of *Shimuzu* was nothing but an
C illustration of application of a trite principle that the burden to proof lies on those who allege negligence. The SCJ had applied the correct burden of proof when he held that the burden was on the plaintiff to prove that the fire was caused by the defendant, his servants or agents. (para 13)

D **(2)** The SCJ had come to the correct decision because it was proven that the fire had started from the defendant's house. The defendant had also used his house as a lodging place for rental to various families despite the fact that the house was
E basically a residential property. The defendant did not take any precaution of any nature to prevent an outbreak of fire. The fact that the defendant had turned his house into a lodging house placed a duty of care on him to ensure that no damage was caused to the neighbours. No license was
F obtained from the relevant authority to turn the house into a lodging place which would mean that the house did not comply with regulations such as s. 3(b) of the Miri District Council (Prevention of Fire) By-Laws. The above factors were adequate for the SCJ to infer that the defendant had caused
G the fire. To hold that if the defendant wanted the court to believe that the fire was an accident, the burden was on him to do so which the defendant had failed to do. (para 15)

(3) The admissibility of P3 could not be disputed and was in fact evidence showing the costs of rebuilding the destroyed house.
H The amount awarded (RM63,000) was consistent to the amounts set out in P3. The SCJ had applied the correct principle of law set out in the decision of *Harbutt's Plasticine Ltd v. Wayne Tank and Pump Co. Ltd.* The sum awarded for the loss of the house remained while the others costs were
I varied accordingly. (paras 17 & 18)

Case(s) referred to:

APV Hill & Mills (M) Sdn Bhd v. AQ-Pacific Wide Sdn Bhd & Anor [2006] 1 CLJ 370 CA ***(refd)***

Harbutt's Plasticine Ltd v. Wayne Tank and Pump Co Ltd [1979] 1 QB 447 ***(refd)***

Lembaga Kemajuan Tanah Persekutuan v. Tenaga Nasional Bhd [1997] 2 MLJ 783 ***(refd)***

Leong Bee & Co v. Ling Nam Rubber Works [1970] 2 MLJ 45 ***(refd)***

Shimizu Corporation v. Ling Tiang Chuan & Anor [1993] 3 SCR 77 ***(refd)***

Legislation referred to:

Miri District Council (Prevention of Fire) By-Laws, s. 3(b)

For the appellant - Lim Swee Huat; M/s SH Lim & Co Advocates
For the respondent - Bong Ah Loi; M/s Bong Ah Loi & Co Advocates

Reported by Suhainah Wahiduddin

JUDGMENT

David Wong Dak Wah J:

Appeal

[1] This is an appeal from a judgment dated 29 August 2001 of Sessions Court after a full trial in which the learned Sessions Court Judge (SCJ) held that the appellant was liable for negligence.

[2] In order to understand the nature of the appeal, it is necessary to set out the background, the issues before the SCJ, his findings and the terms of the order.

Background

[3] The respondent was at all material time the registered owner of a 2-storey wooden house known as Lot 317 Jalan Anting, Pujut 1 Miri (respondent's house) while the appellant was at all material time the registered owner of the house known as Lot 364 (appellant's house) which is adjoining to Lot 317.

[4] A fire broke out on the 8 November 1997 at the appellant's house and it spread over to Lot 317 and burned down the respondent's house at Lot 317.

[5] The respondent's claim against the appellant is for the losses and damages suffered as a result of the said outbreak of fire.

[6] On 28 August 2001, at the conclusion of trial, the SCJ found the appellant liable and awarded the respondent damages as follows:

a) Cost of Constructing a new house	RM63,000
b) Loss of working utilities	RM10,000
c) Cost of rental (RM300 x 3 months)	RM900
d) Replacement cost for land title	RM50
e) Fire Report Fee	RM 100
Total:	RM74,050

The Judgment Below

[7] The SCJ identified three issues arising from the fire which destroyed the respondent's house. Those issues are (i) whether the fire was caused by the negligence of the appellant, his agents or servants, (ii) whether the appellant, his agents or servant had allowed the fire to escape from his house and damage the plaintiff's house and personal effects and (iii) whether the appellant and/or his agents or servants failed to prevent the fire from escaping from his house.

The SCJ found that there was no evidence for him to make any finding to issues (ii) and (iii). In respect of issue (i), this is what the SCJ said:

> .. The burden is on the plaintiff to prove that it was caused by the defendant, their servants or agents. The defendant is the owner of the house Lot 364. He has control and management of the house. But in the evidence of the defendant and his witnesses, except the painting and some renovation, he did nothing to his house. The electrical wires there had been used for many years but were not changed by the defendant even once. He also did not put buckets of water around his house nor any fire extinguisher and/or fire fighting equipment being installed in his house. He rented out his house to many family tenants for many years without taking any precaution to prevent fire. The fire started in his house and spread to the plaintiff's house. There was no explanation as to how the fire started. Without negligence of somebody, the fire outbreak on the defendant's house would not have happened in the ordinary course of things. In the circumstances, the inference to be drawn is that the fire could not have started without negligence on the part of the defendant, his

servants or agents in the defendant's house. Therefor it was for the defendant to show that the fire was accidental and could have occurred without the negligence and that of his servants or agents.

Contentions Of Counsel

[8] Mr Lim Swee Fatt, learned counsel for the appellant raised three grounds of appeal which in essence attacked the SCJ's reliance of the Singapore case of *Shimizu Corporation v. Ling Tiang Chuan & Anor* [1993] 3 SCR 77 and ignoring the principle set out in the case of *Leong Bee & Co v. Ling Nam Rubber Works* [1970] 2 MLJ 45 (followed by *Lembaga Kemajuan Tanah Persekutuan v. Tenaga Nasional Bhd* [1997] 2 MLJ 783) where it was held that:

> ... in Malaysia the common law presumption referred to in *Becquet v. Mac Carthy* [1831] 2 B & Ad 951 at p. 958, *Musgrove v. Pandelis* [1919] 1 KB 314 at p 317 and *Mason v. Levy Auto Parts of England Ltd* [1967] 2 QB 530 at pp 538, 539 that a fire which began on a man's property arose from some act or default for which he was answerable, has no application in Malaysia and has had no application there at least since the coming into force of the Civil Law Ordinance, 1956, s. 3. The reason is that having been displaced by statute, first by 6 Anne c. 31, s. 6 and later by the Fires Prevention (Metropolis) Act, 1774, 14 Geo. 3, c. 78, s. 86, the presumption formed no part of the common law of England as administered in England at that date. Upon the appellants lay the burden of proof as to both negligence and nuisance, and their task at the trial was to establish, without the aid of the presumption, (a) that the respondents themselves or some person for whose conduct they were answerable had been guilty of some negligent act or omission which was a cause either of the commencement of the fire or of its spreading to the appellants' premises, or (b) that the respondents had caused or permitted to exist on their premises a source of fire danger constituting a material injury to the appellants' property. If they succeeded on either issue they had further to establish, for the assessment of damages, that the destruction of their building was reasonably foreseeable as a consequence of a kind likely to flow from the respondents' wrongful conduct: *Overseas Tankship (UK) Ltd v. Norts Dock & Engineering Co Pty Ltd* [1961] AC 388.

[9] Mr Bong Ah Loi, Learned counsel for the respondent naturally submitted that the SCJ was correct in relying on the case of *Shimizu Corporation v. Ling Tiang Chuan & Anor (supra)* and that even without the reliance of the just quoted case, there are ample evidences adduced in court to show that the appellant had been negligent in the outbreak of the fire.

A

Findings Of The Court

[10] For me to come to a conclusion I must now examine the two cases. I shall first now examine *Shimizu Corporation v. Ling Tiang Chuan & Anor (supra)*, the facts as per the head note of the
B report are:

> The plaintiffs, who were developers and contractors, were engaged by the Housing and Development Board ('HDB') to construct apartments blocks in housing estates. The plaintiffs built a temporary timber building at one of its sites for storing building
C materials. The defendants were contractors also engaged by HDB to construct apartment blocks in the same or adjoining areas as the plaintiffs. They constructed at the site next to the plaintiffs' building a temporary three-storey timber building ('the defendants' building') as living quarters for their workers.
>
D On 17 July 1988 at about 8.40pm, a fire broke out which totally destroyed and gutted the defendants' building and partially damaged the plaintiffs' building. The plaintiffs instituted this action against the defendants claiming damages alleging that the fire was caused by the negligence of the defendants and/or their
E servants or agents as owners and occupiers of the building. In the alternative they averred that the defendants had allowed cooking on kerosene stoves to be carried on in the building and allowed the fire to escape to damage the plaintiffs' building. The defendants took out a third party notice against their insurers ('the insurers'), the third party, claiming an indemnity or alternatively
F damages for breach of contract of insurance.
>
> As between the plaintiffs and the defendants, the issues were: (i) whether the fire was caused by the negligence of the defendants, their servants or agents, and (ii) whether the defendants, their
G servants or agents had allowed to be brought to the defendant's building a kerosene stove for cooking and had allowed fire to escape therefrom and to damage the plaintiffs' property.
>
> LP Thean J approached the issue in the following manner:
>
> > There remains only the first issue, ie whether the fire was
> H caused by the negligence of the defendants, their servants or agents. The burden is on the plaintiffs to prove that it was so caused by the defendants, their servants or agents. However, at all material times, the defendants by their servants or agents had possession and were in occupation
> I of their building and the fire started in the defendants' building and spread to the plaintiffs' building. There was no explanation as to how the fire started. In such circumstances, the inference to be drawn is that the fire

> could not have started without some lack of care on the part of the defendants' servants or agents in the defendants' building. Therefore, it was for the defendants to show that the fire was accidental and could have occurred without their negligence and that of their servants or agents. Unfortunately, the defendants have not succeeded; they have not displaced the inference that the fire was caused by their negligence or that of their servants or agents.

In *Bennett v. Chemical Construction (GB) Ltd* [1971] 1 WLR 1571 the plaintiff, a foreman, was supervising the installation of 12 electrical panels. The plaintiff noticed that one of the panels was about to fall and rushed forward to prevent it from falling, and while he was doing so, another heavy panel fell on him and injured him. The defendants called no evidence and the trial judge could not determine how the accident happened and came to the conclusion on the facts that there must have been a lack of care on the part of the defendants' employees and found in favour of the plaintiffs. On appeal, his decision was affirmed. Davies LJ said, at p. 1575:

> Mr Wood has strenuously argued that really there was no evidence on which the judge could make a finding of negligence, since the plaintiff had failed to prove how the accident happened. He went further and said that it would be quite wrong for this court to approach the case on the basis of the well known doctrine of *res ipsa loquitur*. He pointed out that, although it had been indicated in correspondence before the trial that the plaintiff was going to rely on that doctrine, no amendment to the pleading was made; and the judge never himself referred to *res ipsa loquitur*.

In my view it is not necessary for that doctrine to be pleaded. If the accident is proved to have happened in such a way that *prima facie* it could not have happened without negligence on the part of the defendants, then it is for the defendants to explain and show how the accident could have happened without negligence. The defendants made no attempt to do that in this case. In my judgment this is really a classic case of *res ipsa loquitur*. Here you have the panel being moved by the defendants' men, and it falls. It should not have fallen. The defendants might, as Edmund Davies LJ said in the course of the argument, if it were so, have called evidence to show that one or more of the men had a sudden stroke or something of that kind, which no one could foresee. But here the panel fell, and I entirely agree with the judge that it could not possibly have fallen without some apparent negligence on the part of the defendants.

[11] In the case of *Leong Bee & Co v. Ling Nam Rubber Works (supra)*, the facts as per the law report were that a fire broke out in the early hours of a Sunday morning at a factory building occupied by the respondents at Tampoi, Johore Bahru and it spread to the building next door which was owned and occupied by the appellants and destroyed it also. The appellants sued the respondents for damages for the loss occasioned to them by the fire, asserting causes of action in negligence and nuisance. The trial judge gave judgment for the appellants on the claim in negligence but dismissed the claim in nuisance. On appeal to the Federal Court the decision of the trial judge on the claim in negligence was reversed, but they dismissed a cross appeal on the claim in nuisance. The appellants appealed to the Privy Council.

[12] The Privy Council found that there was no duty of care on the part of the respondent as the fire in the respondent's premises in the early hours of the morning could not have been reasonably foreseen as there was no evidence that the respondent either had brought on their land a source of fire danger imperilling the appellant's property in the form of a building or materials likely to catch fire or of machinery likely to commence a fire or they had permitted a condition conducive to an outbreak of fire to exist there.

[13] Having read the two judgments with utmost care, I am of the view that they can exist side by side as they do not contradict each other. In the case of *Leong Bee & Co v. Ling Nam Rubber Works (supra)*, the Privy Council was actually stating a principle of evidential law and that is the common law presumption that a man is answerable for the damage that results from a fire which began on his property has no application in Malaysia and the burden of proof lies on the person who alleges negligence. While the case of *Shimizu Corporation v. Ling Tiang Chuan & Anor (supra)* is nothing but an illustration of application of a trite principle that the burden of proof lies on those who allege negligence.

[14] Reverting back to the appeal at hand firstly let me say the SCJ had applied the correct burden of proof when he held that the burden is on the plaintiff to prove that the fire was caused by the defendant, his servants or agents. The issue which now

confronts me is to consider whether or not the decision of SCJ is a decision which no reasonable tribunal would have come to. (see *APV Hill & Mills (M) Sdn Bhd v. AQ-Pacific Wide Sdn Bhd* [2006] 1 CLJ 370).

[15] Having read and re-read the grounds of the SCJ for his decision, I am of the view that the SCJ had come to the correct decision and my reasons are these:

1. The fire had started from the defendant's house.

2. The defendant had used his house as a lodging place for rental to various families despite the fact that the house was basically a residential property.

3. Despite making his house into a lodging place, the defendant did not take any precaution of any nature to prevent an outbreak of fire. Precaution such as an examination of the electrical wires in the house in view of the fact of many users of the same which could have caused an overload. There was also no fire extinguisher placed in the vicinity of the house.

4. The fact that the defendant had turned his house into a lodging house places a duty of care on him to ensure that no damage is caused to the neighbours.

5. No license was obtained from the relevant authority to turn the house into a lodging place which would mean that the house did not comply with regulations such as s. 3(b) of the Miri District Council (Prevention of Fire) By-Laws which provides that at least a gallon of water be made available for use in case of fire and Building Ordinance 1994 By Laws which requires fire extinguishers placed in the defendant's house.

6. There was no inspection by the defendant to ensure that his tenants did not have any materials which are likely to cause an outbreak of fire.

7. The defendant at all times was in control of the defendant's house.

A 8. The above factors in my view were adequate for the SCJ to infer that the defendant had caused the fire and to hold that if the defendant wanted the court to believe that the fire was an accident, the burden was on him to do so which the defendant had failed to do.

B

[16] I now come to the quantum of damages awarded by the SCJ.

[17] I first deal with the costs of the house. The appellant had submitted that exhs. P4 (a) and P4 (b) should not be admitted as C they were not disclosed at the discovery stage. In my view the SCJ was correct in accepting the explanation of the maker of the documents (PW2) in that he was at the relevant time outside the country. In any event the admissibility of P3 cannot be disputed and is in fact evidence showing the costs of rebuilding the D destroyed house. And it can be seen from the amount awarded (RM63,000) is consistent to the amounts set out in P3. In any event the SCJ had applied the correct principle of law set out in the decision of *Harbutt's Plasticine Ltd v. Wayne Tank and Pump Co Ltd* [1979] 1 QB 447 where it was held by the Court of Appeal E that:

> ... where a building was destroyed and the innocent party had no option but to build a new one, the proper measure of damages was the cost of replacement ... the Defendants were not entitled F any allowance for any benefit to the Plaintiffs from having a new factory

[18] Accordingly, the sum awarded for the loss of the house remains.

G **[19]** In respect of the loss of amenities, Mr Bong Ah Loi had correctly conceded that there were no documentary proof to the amount awarded, ie, RM10,000. That being the case I am left with no option but to vary the amount. Taking into consideration of the present price for electrical appliances, I vary the amount to H RM3,000.

[20] Finally in respect of cost of rental (RM300 x 3 months), Replacement cost for land title (RM50) and Fire Report Fee (RM100) they are reasonable and shall remain.

I

Conclusion

[21] Therefore this appeal against the SCJ is dismissed with costs to be taxed unless agreed except that the new revised quantum to be awarded is as follows:

a) Cost of Constructing a new house		RM63,000
b) Loss of working utilities		RM 3,000
c) Cost of rental (RM300 x 3 months)		RM 900
d) Replacement cost for land title		RM 50
e) Fire Report Fee		RM 100
	Total:	RM67,050